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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 IN RE: Bard IVC Filters Products Liability
10 Litigation,
11 _____

No. MDL 15-02641-PHX-DGC

12 Lisa Hyde and Mark E. Hyde, a married
13 couple,

No. CV-16-00893-PHX-DGC

14 Plaintiffs,

ORDER

15 v.

16 C. R. Bard, Inc., a New Jersey corporation;
17 and Bard Peripheral Vascular, Inc., an
18 Arizona corporation,

19 Defendants.
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22 This bellwether case is set for trial in September. The parties dispute whether the
23 Bard IVC filter at issue was a G2X or an Eclipse. Docs. 7359 at 2 n.2, 7952 at 1 n.1.
24 The parties have filed a report addressing whether there is a means for determining the
25 filter type prior to trial, or whether this will be an issue for the jury. Docs. 12007, 12096.
The Court concludes that the issue should be presented to the jury.

26 **I. Background.**

27 Multiple versions of Bard IVC filters are involved in this MDL – the Recovery,
28 G2, G2X, Eclipse, Meridian, and Denali. Each filter is a variation of its predecessor.

1 The G2X is the same as the G2, but with a retrieval hook added to the filter's tip. The
2 Eclipse is an electropolished version of the G2X.

3 Plaintiff Lisa Hyde received a Bard filter implant in February 2011. Dr. David
4 Henry implanted the filter at Wheaton hospital in Wisconsin. In May 2014, a CT scan
5 showed that the filter had tilted, perforated the IVC wall, and fractured. Three months
6 later, Dr. William Kuo removed the filter at Stanford medical center in California. The
7 filter was discarded after removal.

8 **II. Discussion.**

9 Defendants argue that there is no definitive means for determining whether
10 Ms. Hyde received a G2X or an Eclipse and that the issue therefore constitutes a genuine
11 dispute of fact that should be resolved by the jury. Doc. 12096 at 2-6. Because this case
12 was submitted as a G2X case for purposes of the bellwether selection process, Plaintiffs
13 contend that Defendants should be estopped from now claiming that the filter was an
14 Eclipse. *Id.* at 11-15. Defendants counter that judicial estoppel is not warranted because
15 the confusion about the filter type is the result of mere inadvertence. *Id.* at 7-10.

16 **A. The Filter Type Is a Question of Fact for the Jury.**

17 The medical records are inconclusive. No product number identifying the filter is
18 referenced. Dr. Henry's treatment notes indicate that Plaintiff received a G2 filter
19 (Doc. 12102-2 at 2-4), but the parties agree that the filter was either a G2X or an Eclipse
20 because CT scans show that the filter had a retrieval hook. Dr. Kuo's notes describe the
21 filter as both a G2X and an Eclipse. *Id.* at 7, 11, 14-15.

22 The doctors were not able to clarify matters during their depositions. When asked
23 whether Ms. Hyde received a G2X filter, Dr. Henry stated: "I believe it may have been,
24 but I'm not sure." Doc. 12102-3 at 3. Dr. Kuo explained that the G2X and Eclipse look
25 the same on an x-ray and, after seeing Ms. Hyde's filter upon removal, he could not
26 distinguish the filter type. Doc. 12102-4 at 4-7.

27 Bard's sales records and testimony from sales representative for Wheaton hospital
28 suggest that both a G2X and an Eclipse were available to Dr. Henry on the date of

1 implant. Doc. 12096 at 4-6. Nothing in the evidence conclusively shows the type of
2 filter Ms. Hyde actually received. The issue must be resolved by the jury.

3 **B. Judicial Estoppel Is Not Warranted.**

4 Judicial estoppel is an equitable doctrine that protects the integrity of the judicial
5 process by precluding a party from “asserting one position, and then later seeking an
6 advantage by taking a clearly inconsistent position.” *Hamilton v. State Farm Fire & Cas.*
7 *Co.*, 270 F.3d 778, 782 (9th Cir. 2001). Relevant factors include whether: (1) the party’s
8 positions are clearly inconsistent, (2) the party has misled the court, (3) the positions were
9 based on “chicanery” instead of inadvertence or mistake, and (4) the party would derive
10 an unfair advantage if not estopped. *See New Hampshire v. Maine*, 532 U.S. 742, 749
11 (2001); *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 995 (9th
12 Cir. 2012); *Johnson v. Or. Dep’t of Human Res.*, 141 F.3d 1361, 1369 (9th Cir. 1998).

13 Plaintiffs do not specifically address these factors. Doc. 12096 at 11-16.
14 Defendants argue that the factors show that judicial estoppel is not warranted. *Id.* at 7-10.
15 The Court agrees with Defendants.

16 Based upon the medical records, the parties initially believed that Ms. Hyde
17 received a G2 filter. Indeed, the filter was identified as a G2 in Ms. Hyde’s short-form
18 complaint, profile form, and fact sheet. Doc. 12102 at 2, 5; Doc. 1 at 3, Case No. 16-CV-
19 00893-PHX-DGC. The filter also was described as a G2 in Plaintiffs’ submission of
20 cases for the bellwether selection process. Doc. 5706 at 17.

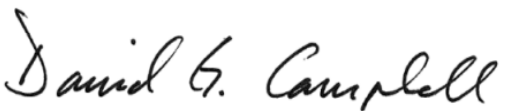
21 Bard stated that the filter was a G2X in its submission for bellwether cases, but
22 nothing suggests that Bard took this position in an effort to mislead the Court or gain an
23 unfair advantage at trial. Doc. 5652 at 6. Defendants argued that their proposed
24 bellwether cases were representative of other cases in the MDL based largely on filter
25 complications, not filter types. *Id.* at 6-8. Ms. Hyde’s case was no exception.
26 Defendants claimed that her case was representative because it “involves a filter fracture
27 (25% of the pool) and also involves multiple complications in a single case including tilt,
28 perforation, a filter strut to the heart, and a complex filter retrieval.” *Id.* at 6.

1 Plaintiffs assert that they are prepared to try a G2X case, not an Eclipse case. *Id.*
2 at 11. But Plaintiffs identify no specific unfair advantage that Defendants would gain if
3 the case were to be tried as an Eclipse case. Plaintiffs have been aware of Defendants'
4 position regarding the filter type for more than a year. Doc. 11921-1 at 3. Plaintiffs
5 noted in their summary judgment brief that because the Eclipse filter did nothing to
6 address the design defects of the G2X, "the difference between the models is
7 unimportant." Doc. 7952 at 1-2 n.1. Moreover, Plaintiffs will be allowed to present
8 evidence to the jury that the filter was a G2X. *See id.*

9 In summary, the Court cannot conclude that Defendants would gain an unfair
10 advantage at trial by presenting evidence that the filter was an Eclipse. Nor can the Court
11 conclude that Defendants have misled the Court or that their change in position was
12 based on "chicanery" rather than inadvertence and mistake. *Johnson*, 141 F.3d at 1369.
13 Judicial estoppel is not warranted. *See United States v. Ibrahim*, 522 F.3d 1003, 1009
14 (9th Cir. 2008) (holding that the party's "mistake does not meet the criteria for applying
15 judicial estoppel").

16 **IT IS ORDERED** that the parties' dispute as to whether Plaintiff Lisa Hyde
17 received a G2X or an Eclipse filter presents a triable issue of fact for the jury.

18 Dated this 16th day of August, 2018.

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22 David G. Campbell
23 Senior United States District Judge
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